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SHOULD EMPLOYERS HAVE THE ABILITY TO ENFORCE NON-COMPETE AGREEMENTS WITHOUT ALSO OFFERING A WRITTEN EMPLOYMENT CONTRACT?

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INTRODUCTION

As the use of non-compete agreements has risen drastically in the employment context,[2] employers are imposing non-compete agreements without also providing written employment contracts, or any other type of job security, to employees.[3] While non-compete agreements have traditionally been associated with high-skill employees, many employees—most without a bachelor's degree—are now subject to enforceable non-compete agreements.[4] Employers often justify non-compete agreements as necessary to protect confidential information regarding their products or services, or as an employee retention strategy.[5] The retention justification fails, when employees do not have a complementary promise of job security through a written employment contract. Some courts have acknowledged this lack of justification for a non-compete agreements by holding it unenforceable where an at-will employee has been fired without cause.[6] The underlying theory of holding such non-compete agreements unenforceable is a lack of equity in enforcing an agreement against employees when the employer no longer wants their services.[7] The same theory applies in this setting: a non-compete agreement should not be enforceable against an employee if the employer does not find that employee valuable enough to offer a written employment contract. Under a written employment contract, an employee usually receives job security, as the employee is no longer considered at-will, and therefore can only be fired for just cause.[8] The power differential between an employer and an employee is highlighted by an employment relationship without a written employment contract, which provides a benefit to the employer in retaining an employee's skills, but does not provide a comparable benefit—like job security—to the employee. While this differential is somewhat offset by the ability of employees to prove they had a verbal employment contract and therefore cannot be fired without cause,[9] it would prevent litigation costs if these employment contracts were in written form prior to any dispute.

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[2] Evan Starr et al., *Noncompetes in the U.S. Labor Force* (Univ. of Mich. Law & Econ., Research Paper No. 18-013, 2019) https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3248705_code2006805.pdf?abstractid=2625714&mirid=1&type=2 [https://perma.cc/6SVL-QUG4] ("Nearly 1 in 5 labor force participants were bound by noncompetes in 2014 . . . ."); Conor Dougherty, *How Noncompete Clauses Keep Workers Locked in*, N.Y. TIMES (May 13, 2017), https://www.nytimes.com/2017/05/13/business/noncompete-clauses.html [https://perma.cc/CS4G-B7NQ].

[3] Starr et al., *supra* note 2, at 30 (observing that only seven percent of employees interviewed received assurance of job security).

[4] *Id.* at 2–3.

[5] *Non-Compete Agreements*, JUSTIA, https://www.justia.com/employment/hiring-employment-contracts/noncompete-agreements/ [https://perma.cc/B95A-AFW8].

[6] *E.g.* Lantech.com v. Yarbrough, 247 F. App'x 769, 771–72 (6th Cir. 2007).

[7] *Id.* at 772.

[8] *Employment Contracts and Compensation Agreements*, FINDLAW, https://employment.findlaw.com/hiring-process/employment-contracts-and-compensation-agreements.html [https://perma.cc/RYX8-7JUH].

[9] *See Lantech.com*, 247 F. App'x at 770, 772 (noting that the plaintiff claimed he only signed the non-compete agreement after being told the job with Lantech was a "life-long relationship" and that the plaintiff's termination was "abrupt, peremptory, and without explanation").

In order for a non-compete agreement to be considered enforceable by the courts, it must be related to a "legitimate business interest" and properly limited in scope to address that legitimate business interest.[10] Courts analyze whether an employer has a "legitimate business interest" by looking to the facts and circumstances to see if "the employee would gain an unfair advantage in future competition with the employer."[11] This inquiry is typically aimed at protecting an employer's confidential information, but some courts approach the inquiry more liberally to ensure equity for the employee.[12] In this scenario, equity is guided by the circumstances surrounding the employee's firing, specifically if the employer "discharged the employee unfairly."[13] Because of this more liberal approach, as well as courts' reluctance to enforce non-compete agreements, there is an opportunity to further the equity evaluation when addressing non-compete agreements. Courts should adopt an approach where non-compete agreements will not be enforced without the employer offering a written employment contract, as there can be no "legitimate business interest." A "legitimate business interest" typically requires that the employee will be able to "gain an unfair advantage in future competition with the employer."[14] It logically follows that if an employer discharges an employee without cause, it has no legitimate business interest in utilizing that employee's skills or "advantages" any longer, as the employer has decided the employee cannot provide any further value to its business. Using the "legitimate business interest" prong in order to accomplish public policy directives will guarantee that the doctrine stays largely the same. Notably, it will ensure that courts will be able to apply the new standard with ease, as it fits in with the current doctrinal requirements. One scholar has argued that an employer's bargaining power should be considered when evaluating the enforceability of non-compete agreements.[15] While this subjective approach has merit, it will be much easier for courts to apply the objective standard of evaluating whether or not an employee has a written employment contract when deciding if a non-compete agreement should be enforced.

Part I of this Note will provide a brief overview of non-compete agreements and what is required for the agreements to be enforceable. Part II will discuss how courts have addressed the equity problem between employers and employees in the non-compete setting and the "legitimate business interest" prong, which is necessary to satisfy for a non-compete agreement to be enforced. It will also address how the "legitimate business interest" prong has been used as a vehicle to tackle public policy concerns. Part III will consider the adoption of making non-compete agreements unenforceable without the employer offering a written employment contract, as there

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[10] Navajo Air, L.L.C. v. Crye Precision, L.L.C., 318 F. Supp. 3d 640, 649 (S.D.N.Y. 2018).

[11] Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).

[12] *E.g. Lantech.com*, 247 F. App'x at 772, 774.

[13] *Id.* at 774 ("[A] Kentucky court may look to the circumstances in which an employee was discharged in deciding whether to grant an injunction enforcing a covenant not to compete, and may refuse to enforce an otherwise valid agreement if the court finds that the employer discharged the employee unfairly.").

[14] *Vantage Tech.*, 17 S.W.3d at 644.

[15] *See generally* Kate O'Neill, *'Should I Stay or Should I Go?'—Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L.J. 83 (2010) (arguing that unequal power dynamics between employer and employee diminish an employee's bargaining power to obtain a fair contract, as opposed to being subjected to unfair non-compete agreements).

cannot be a legitimate business interest. It will further discuss the likelihood of courts adopting this new approach.

I. OVERVIEW OF NON-COMPETE AGREEMENTS

Non-compete agreements are typically enforceable against an employee if they are justified by a legitimate business interest and are limited in scope to protect the legitimate business interest in: duration, geographic reach, and scope of activity.[16] A non-compete agreement is related to a legitimate business interest if the facts are "such that without the covenant, the employee would gain an unfair advantage in future competition with the employer."[17] An inquiry into this advantage includes:

> (1) whether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with the customers on behalf of the employer.[18]

This inquiry focuses on protecting the employer's investment in the employee and, more importantly, protecting the employer's confidential information that may be a vital part of its business.[19] It is important that the restriction does not only prohibit fair competition with the previous employer for the sake of prohibiting competition; there must be some further "legitimate interest."[20]

As for the scope of non-compete agreements, they are typically limited by a reasonableness inquiry.[21] This inquiry includes "the whole subject matter of the contract, the kind and character of business, its location, the purpose to be accomplished by the restriction, and all circumstances which show the intention of the parties and which must have entered into the making of the contract."[22] Individual facts and circumstances are taken into account in order to determine reasonableness.[23] At least one court has also included "the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed on the employee by such a covenant; and whether or not such a covenant should be inimical to public interest" as factors in evaluating reasonableness.[24] Public interest is one of the more important factors in evaluating the scope of a non-compete agreement, which is usually most relevant in reference to healthcare providers.[25] Due to the possibility of the non-compete

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[16] Navajo Air, L.L.C. v. Crye Precision, L.L.C., 318 F. Supp. 3d 640, 649 (S.D.N.Y. 2018).
[17] *Vantage Tech.*, 17 S.W.3d at 644.
[18] *Id.*
[19] *Id.* at 644–45.
[20] Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281 (Ariz. 1999) (en banc).
[21] Reeves v. Sargeant, 21 S.E.2d 184, 187–88 (S.C. 1942).
[22] *Id.* at 188.
[23] *Id.*
[24] *E.g.* Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966).
[25] *Valley Med. Specialists*, 982 P.2d at 1281–82.

agreements damaging public interest, non-compete agreements in this context are evaluated under a strict scrutiny standard.[26]

As referenced above, states that non-compete agreements must be created with good consideration.[27] Typically, the offer of employment is contingent on signing the non-compete agreement, and the employment itself constitutes the consideration. It is unlikely that continued employment is enough consideration to bind employees who sign non-compete agreements after they start work with an employer.[28] But there are cases that hold otherwise.[29]

Non-compete agreements are generally litigated through preliminary injunctions.[30] If the court does not issue a preliminary injunction, the harm is realized as soon as the employee begins working for a competing enterprise of the original employer. For a preliminary injunction to be issued, the Supreme Court has said that it is necessary for the party asking for the injunction to establish the following factors: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[31] Because most employers attempt to enforce non-compete agreements through preliminary injunction, they must illustrate not only that there is a legitimate business purpose for the non-compete agreement and that its scope is reasonable, but also the factors necessary for a preliminary injunction to be issued. Additionally, because non-compete agreements are restraints on trade, the burden of proof for enforcing a non-compete agreement generally lies with the employer.[32]

Employers benefit from the use of non-compete agreements in a variety of ways. The agreements can help preserve the value of the employer's assets, protect and retain clients, ensure the value of the company for future sales, protect confidential information or gain trade secret protection, and encourage investment in employee training. The benefits for employees are not quite as clear. In order to compensate employees for the restrictions placed on them by non-compete agreements, it would not be too large a burden on employers to provide some form of job security through a written employment agreement. In exchange for an enforceable non-compete agreement, employees could only be fired for just cause under the written agreement.

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[26] *Id.* at 1283.

[27] *E.g.* Rem Metals Corp. v. Logan, 565 P.2d 1080, 1083 (Or. 1977) (quoting Eldridge v. Johnston, 245 P.2d 239, 250 (Or. 1952)).

[28] Jeffrey A. Simmons, *Non-Competes for Existing Employees May Require Additional Consideration*, FOLEY & LARDNER LLP: LAB. & EMP. L. PERSP. BLOG (Jan. 22, 2018), https://www.foley.com/en/insights/publications/2018/01/noncompetes-for-existing-employees-may-require-add [https://perma.cc/B6VW-MMWV].

[29] *E.g.*, Lucht's Concrete Pumping, Inc. v. Horner, 255 P.3d 1058, 1061–63 (Colo. 2011); Lake Land Emp't Grp. v. Columber, 804 N.E.2d 27, 33 (Ohio 2004).

[30] Norman D. Bishara et al., *An Empirical Analysis of Noncompetition Clauses and Other Restrictive Postemployment Covenants*, 68 VAND. L. REV. 1, 46 (2015).

[31] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

[32] Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc., 618 S.E.2d 340, 342 (Va. 2005).

Traditionally, an employment agreement between an employer and an employee is an implied agreement that constitutes at-will employment.[33] Most states have at-will employment as a default, with the exception of Montana, which provides that employees may not be wrongfully dismissed.[34] At-will employment "can be terminated by either party at any time for any reason."[35] The employment agreement has no specific duration, and the terms of employment can be changed at the will of the employer.[36] For these reasons, at-will employment primarily favors employers and allows them flexibility in their hiring and firing processes, including the ability to terminate an employee suddenly and without cause.[37] While some states have addressed this issue by providing relief through the court systems—through recognizing implied-in-fact contracts where the employer made promises to continue the employee's employment[38]—this fails to cover a large portion of employees. The alternative, employment terminable for just cause, typically means that the employee can only be terminated for conduct stated in the written employment agreement (which can include employee handbooks)[39] or conduct that "a reasonable employer, acting in good faith, would regard as good and sufficient reason for terminating the services of an employee, as distinguished from an arbitrary whim or caprice."[40] A minority of states allow the just cause standard to be met as long as the employer gives "a proper reason for dismissal."[41] Because an employer's justification for terminating an employee only needs to be reasonable, this could include anything from specific conduct to "legitimate economic reasons."[42] This would still give employers wide latitude to discipline their employees and flexibility in times of economic distress.

As non-compete agreements are almost entirely governed by state case law, each state has unique approaches to enforcing the agreements. The same basic principal of enforcement, however, spans across most states: there must be a legitimate business interest and the scope of the agreement must be reasonable.[43] It is important to note that some specific states have more novel approaches. For example, New York will not enforce a non-compete agreement if an at-will employee is terminated without cause.[44] This approach is aimed at balancing the equities between an

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[33] Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L.J. 84, 84 (2007).

[34] *Id.* at 90.

[35] *Id.* at 84.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 89.

[39] Woolley v. Hoffmann-La Roche, Inc. 99 N.J. 284, 302 (N.J. 1985).

[40] Ahmann v. Neb. Dep't of Corr. Servs., 767 N.W.2d 104, 111 (Neb. 2009).

[41] Gaudio v. Griffin Health Servs. Corp., 733 A.2d 197, 208 (Conn. 1999) (quoting Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 386 (Conn. 1980)).

[42] Uintah Basin Med. Ctr. v. Hardy, 110 P.3d 168, 174 (Utah Ct. App. 2005).

[43] Navajo Air, L.L.C. v. Crye Precision, L.L.C., 318 F. Supp. 3d 640, 649 (S.D.N.Y. 2018).

[44] *See* Buchanan Capital Mkts., L.L.C. v. DeLucca, 41 N.Y.S.3d 229, 230 (N.Y. App. Div. 2016) ("[S]uch covenants are not enforceable if the employer [] does not demonstrate 'continued willingness to employ the party covenanting not to compete.'" (quoting Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358, 360–61 (N.Y. 1979))).

employee and an employer.[45] In California, non-compete agreements are unlawful, unless there is a statutory exception.[46] These statutory exceptions include—if in conjunction with the sale or dissolution of the company—allowing non-compete agreements for business owners, between partners in a partnership, and between members of a limited liability company.[47]

II. JUSTIFICATIONS FOR NON-COMPETE AGREEMENTS UNDER THE LEGITIMATE BUSINESS INTEREST PRONG

A. Approaches to Addressing the Equity Problem in Non-Compete Agreements

In evaluating whether a non-compete agreement is enforceable, equity is not often overtly mentioned, but does play a role in the analysis. Courts look critically on whether or not the employer terminated the employee without cause,[48] while another looks at the manner of the firing,[49] and still another evaluates the power differential in bargaining between the employee and the employer.[50] While equity is an important factor, the differing approaches of jurisdictions can lead to different results in the protection of employees. By using an objective standard, written contracts providing for non-compete agreements to be unenforceable if the employee is fired without cause, these inconsistencies in the protection of employees would be limited.

For non-compete agreements to be enforceable in New York, the employer must show a "continued willingness to employ the party covenanting not to compete."[51] In *Buchanan Capital Markets, L.L.C. v. DeLucca*, the Supreme Court of New York Appellate Divsion declined to grant a preliminary injunction enforcing non-compete agreements entered into by past Buchanan employees.[52] While Buchanan had lost new customers to the past employees, the court reasoned that this could be mitigated by money damages, instead of an injunction.[53] Because the employer did not show a "continued willingness to employ" the employees, as they were terminated without cause, equity weighed in favor of the employees, and the court refused to grant the preliminary injunction.[54]

Similarly, in *Lantech.com v. Yarbrough*, the Sixth Circuit declined to enforce a non-compete agreement when an employee's termination was described as "abrupt,

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[45] *Id.* at 230.

[46] SCOTT WENNER, SCHNADER HARRISON SEGAL & LEWIS LLP, NON-COMPETE LAWS: CALIFORNIA § 3 (2019), Westlaw Practical Law Labor & Employment.

[47] *Id.* § 1.

[48] *E.g. Buchanan Capital Mkts.*, 41 N.Y.S.3d at 230.

[49] Lantech.com v. Yarbrough, 247 F. App'x 769, 772–73 (6th Cir. 2007).

[50] Gann v. Morris, 596 P.2d 43, 44 (Ariz. Ct. App. 1979).

[51] *Buchanan Capital Mkts.*, 41 N.Y.S.3d at 230 (quoting Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358, 360–61 (N.Y. 1979)).

[52] *Id.*

[53] *Id.*

[54] *Id.* (quoting *Merrill Lynch*, 397 N.E.2d at 360–61).

peremptory, and without explanation."[55] Yarbrough was employed by Lantech and had signed a non-compete agreement prohibiting him from working for any company involved in stretch wrapping or other equipment or manufacturing used by Lantech for two years following his termination.[56] Prior to his termination, Yarbrough was placed on a ninety-day performance plan to improve his sales.[57] After thirty days on the plan, his manager noted that he had increased sales and "was demonstrating 'motivation' and 'passion.'"[58] He was terminated shortly after that review for missing work and not making an impact, which the district court found was demonstrably false.[59] Because of the suddenness of Yarbrough's firing, as well as the lack of justification, the court found that "equities disfavor" the attempt by Lantech to enforce the non-compete agreement through a preliminary injunction.[60] The court found that the inequity alone was "a sufficient, 'independent ground,' for determining that Lantech was not likely to succeed on the merits" and therefore was not entitled to a preliminary injunction.[61] This case reinforces the proposition that Kentucky courts could consider the circumstances surrounding the discharge of the employee when deciding whether to enforce a non-compete agreement.[62]

In Pennsylvania, employment covenants not to compete are "subjected to a more stringent test of reasonableness" (*i.e.*, strict scrutiny) because of the "greater hardship imposed upon an employe[e]."[63] In *Morgan's Home Equipment Corp. v. Martucci*, Morgan's Home Equipment employed a number of traveling salesmen who had "confidential route[s]" provided to them by their employer.[64] After employees of Morgan's Home Equipment had signed non-compete agreements, however, they left the company and began soliciting customers.[65] In reviewing the reasonableness of the agreements not to compete, the court went on to recognize that covenants not to compete in the employment context, versus covenants not to compete in the sale of business context, impose "greater hardship" on employees.[66] This hardship includes the employee's inability to "practic[e] his [or her] trade or skill," his or her experience not transferring to the next job, "few resources in reserve to fall back upon," and the difficulty of moving "to a location beyond the area of potential competition with his [or her] former employer."[67] The court found that because of the "undue hardship" on Morgan's past employees, the non-compete agreements were unenforceable.[68]

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[55] Lantech.com v. Yarbrough, 247 F. App'x 769, 772 (6th Cir. 2007) (quoting Lantech.com, L.L.C. v. Yarbrough, No. 3:06-CV-334-JDM, 2006 WL 3323222, at *2 (W.D. Ky. Nov. 14, 2006)).

[56] *Id.* at 771.

[57] *Id.* at 770–71.

[58] *Id.* at 771.

[59] *Id.* at 771–72.

[60] *Id.* at 769–70 (quoting *Lantech.com*, 2006 WL 3323222, at *2).

[61] *Id.* at 773 (citation omitted).

[62] *Id.* at 774 (citing Crowell v. Woodruff, 245 S.W.2d 447, 449–50 (Ky. 1951)).

[63] Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 846 (Pa. 1957).

[64] *Id.* at 841.

[65] *Id.*

[66] *Id.* at 846.

[67] *Id.*

[68] *Id.* at 846–47.

Similar to Pennsylvania, in Arizona, courts take into account the hardship non-compete agreements place on employees, as well as the "uneven bargaining position of the parties."[69] Louisiana takes this approach one step further by enacting statutory provisions that almost eliminate the enforcement of non-compete agreements entirely. The statute makes non-compete agreements "null and void," unless they fall into a few narrow exceptions.[70] A Louisiana court illustrated the purpose of this statute by observing that individuals should have the freedom "to better themselves in our free-enterprise society, where liberty of the individual is guaranteed."[71] It additionally recognizes "the disparity in bargaining power" between an employee "fearful of losing his means of livelihood," who therefore feels obligated to sign the non-compete agreement in order to obtain the job, and an employer who can ensure the employee may only work for it in any particular field.[72] As for the employer's protection, the statute is only meant to protect an employer when it has "invested substantial sums in special training of the employee or in advertising the employee's connection with his business."[73] Broadly, the purpose of the statute protects the employee from any difference in bargaining power and protects the employer in situations where they have made a substantial investment.

These approaches concerned with equity are similar to the suggested approach of refusing to enforce non-compete agreements if the employer has not provided a written employment contract to the employee terminable only for cause. While New York uses equity as a vehicle to address without cause firings,[74] the Sixth Circuit uses the requirements for issuing a preliminary injunction to address equity in the non-compete setting.[75] Similarly, Pennsylvania takes into account the hardship non-compete agreements place on employees.[76] Arizona and Louisiana courts use an increased level of scrutiny or statutory protection to address the equity problem of differentials in bargaining power.[77] While the Arizona court and Louisiana statute above address bargaining power, courts are typically very wary to directly address the bargaining power differential between the employee and employer as a specific factor in evaluating whether or not a non-compete agreement is enforceable.[78] Further, while there will usually be a bargaining power differential between a typical employee and employer, a rule directly addressing bargaining power could disadvantage employers when bargaining with high-powered employees, such as executives.[79] Although the end result of the above cases may be similar, the legal reasoning behind each of these approaches to non-compete agreements differs.

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[69] Gann v. Morris, 596 P.2d 43, 44 (Ariz. Ct. App. 1979).

[70] LA. STAT. ANN. § 23:921(A)(1) (2019).

[71] Nat'l Motor Club v. Conque, 173 So. 2d 238, 241 (La. Ct. App. 1965).

[72] *Id.*

[73] *Id.*

[74] Buchanan Capital Mkts., L.L.C. v. DeLucca, 41 N.Y.S.3d 229, 230 (N.Y. App. Div. 2016).

[75] Lantech.com v. Yarbrough, 247 F. App'x 769, 770 (6th Cir. 2007).

[76] Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 846–47 (Pa. 1957).

[77] Gann v. Morris, 596 P.2d 43, 44 (Ariz. Ct. App. 1979); *Nat'l Motor Club*, 173 So. 2d at 241.

[78] *See* DONALD J. ASPELUND & JOAN E. BECKNER, EMPLOYEE NONCOMPETITION LAW § 6:19 (2019–20 ed. 2019) ("[A] lack of bargaining power has traditionally had little independent significance in determining the reasonableness of noncompetition agreements.").

[79] *Id.*

Because non-compete agreements are creatures of state law, it is important to find an approach that conforms with the state law as it stands currently. For this reason, using the legitimate business interest prong—which is the standard approach to non-compete agreements—to disallow the use of non-compete agreements without a written employment agreement is an approach that can be easily adopted nationwide. Currently, state courts use several different justifications concerned with equity and public policy, but the outcomes of the individual approaches differ significantly. If courts instead focus on the legitimate business prong that is already incorporated in their state common law, the treatment of non-compete agreements could be standardized and lead to easier-to-follow precedent.

B. Legitimate Business Interest Prong in the Non-Compete Setting, Including Public Policy

As discussed above, in order for a non-compete agreement to be enforceable, the employer must have a legitimate business interest that is supposed to be protected by the agreement.[80] Courts decide whether there is a legitimate business interest by evaluating the harm the business could suffer if the employee were to leave, which might be in reference to loss of clients, confidential information, or training investment.[81] Under the legitimate business interest prong, restraint of ordinary competition is not a strong enough interest to justify the use of a non-compete agreement.[82] At least one state even provides that non-compete agreements "will [only] be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy."[83] As a matter of public policy, there is a lack of justification for the usage of non-compete agreements without offering a written employment contract, which includes only for cause termination under the legitimate business prong.

The evaluation of the legitimate business interest prong entails a variety of inquiries. In *Omniplex World Services Corp. v. United States Investigations Services Inc.*, the court illustrated these inquiries and their purposes.[84] Under the non-compete agreement at issue in this case, upon termination or exit, the employee could not accept employment with any other agency that worked with the United States government and required the same level of security clearance.[85] The court explained that each non-compete agreement "must be evaluated on its own merits."[86] This interpretation of the legitimate business interest prong is aimed at balancing an "employee's right to secure gainful employment and the employer's legitimate

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[80] Navajo Air, L.L.C. v. Crye Precision, L.L.C., 318 F. Supp. 3d 640, 649 (S.D.N.Y. 2018).
[81] Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).
[82] Valley Med. Specialists v. Farber, 982 P.2d 1277, 1281 (Ariz. 1999).
[83] Omniplex World Servs. Corp. v. U.S. Investigations Servs., Inc., 618 S.E.2d 340, 342 (Va. 2005).
[84] *Id.* at 342–43.
[85] *Id.* at 341.
[86] *Id.* at 342.

interest in protection from competition."[87] The court also evaluated if the non-compete agreement was "unduly burdensome on the employee's ability to earn a living."[88] Here, the court did not think that Omniplex had a legitimate business reason because the non-compete agreement was overbroad, restricting the employee from working for almost any employer that had contracted with the federal government.[89]

Similarly, in *Vantage Technology, L.L.C. v. Cross*, the court analyzed the legitimate business interest prong by looking to see whether "the employee would gain an unfair advantage in future competition with the employer."[90] Factors to be considered include:

> (1) [W]hether the employer provided the employee with specialized training; (2) whether the employee is given access to trade or business secrets or other confidential information; and (3) whether the employer's customers tend to associate the employer's business with the employee due to the employee's repeated contacts with customers on behalf of the employer.[91]

Here, Cross was a technician employed by Vantage Technology who signed a non-compete agreement, was thoroughly trained by Vantage Technology, and had access to confidential information prior to leaving his employment.[92] The factors contributing to a legitimate business interest must be "analyzed in isolation" and "analyzed in tandem," in a type of totality of the circumstances analysis.[93] Even though Vantage Technology had a legitimate business interest, this still had to be weighed against "economic hardship" and "public interest."[94] Because, under the totality of the circumstances approach, Cross would have gained "an unfair advantage in competition" with Vantage Technology in the future, the court found that the non-compete agreement was enforceable.[95]

In *Rem Metals Corp. v. Logan*, the court discussed whether an employer had a "protectible interest," which carries the same general meaning as a legitimate business interest, in the "skills and knowledge" of an employee that they had trained in welding.[96] Logan, after receiving training in standard welding procedures and being refused a pay raise, went to work for a competitor of Rem Metals.[97] The court explained that "general knowledge, skill, or facility acquired through training" by an employer in and of itself is not a sufficient business interest to enforce a non-compete

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[87] *Id.*
[88] *Id.*
[89] *Id.* at 343.
[90] Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637, 644 (Tenn. Ct. App. 1999).
[91] *Id.*
[92] *Id.* at 641, 646.
[93] *Id.* at 646.
[94] *Id.* at 647 (citing Allright Auto Parks, Inc. v. Berry, 409 S.W.2d 361, 363 (Tenn. 1966)).
[95] *Id.* at 646, 648.
[96] Rem Metals Corp. v. Logan, 565 P.2d 1080, 1081 (Or. 1977).
[97] *Id.* at 1082.

agreement.[98] Because the burden of proof falls on the employer to demonstrate this protectible interest, the court found that the training alone was not enough evidence to enforce the non-compete agreement against Logan.[99] In holding that skills acquired by an employee are not enough to grant a legitimate business interest to the employer, the court protected the employee's ability to find other gainful employment.

Generally, public policy is a "silent partner" in non-compete agreement cases, and largely left out of the analysis in favor of evaluating more objective factors, like "availability of competitors and other uses for property and resources to the recognized need to protect trade secrets."[100] These objective factors generally assess if the employer has a legitimate business reason for enforcing the non-compete agreement, with public policy taking a back seat in the analysis. Public policy as an inquiry changes with "community standards and needs," however.[101] A Connecticut court noted that "[t]he public policy to be applied is the public policy of the present time."[102] In a work force where almost one in five workers are restricted by non-compete agreements,[103] public policy in this setting should be adapted to protect the interests of both employees and employers.

Because the legitimate business interest prong includes not only a balancing test of the employer's and employee's interests,[104] but also takes into account all the factors that point towards the employer having a legitimate business interest,[105] a factor addressing whether an employee has a written employment agreement terminable only for just cause would be easy to include in the analysis. For example, in Virginia, where part of the legitimate business interest test is to evaluate whether the non-compete agreement is "unduly burdensome on the employee's ability to earn a living,"[106] a written employment agreement for just cause termination could easily be discussed in this context. A legitimate business interest is broad in nature and inquires into the equity of non-compete agreements, sometimes through an evaluation of public policy and other factors, without specifically evaluating the power differential between an employee and an employer. These specific characteristics of the legitimate business prong analysis make it an attractive route to address the power differential through a more objective approach that will not disadvantage employers.

Instead of using this objective approach, one scholar suggests that an employer's bargaining power is specifically included in the analysis as a subjective factor.[107] The problem with this approach is the subjectivity of the analysis. If, instead, a court simply must answer whether there is a written employment agreement as part of the

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[98] *Id.* at 1083 (quoting Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 652 (1960)).

[99] *Id.* at 1084.

[100] ASPELUND & BECKNER, *supra* note 78, at § 6:23 (footnotes omitted).

[101] *Id.*

[102] Samuel Stores, Inc. v. Abrams, 108 A. 541, 543 (Conn. 1919).

[103] Starr et al., *supra* note 2.

[104] Omniplex World Servs. Corp. v. U.S. Investigations Servs., 618 S.E.2d 340, 342 (Va. 2005).

[105] Vantage Tech., L.L.C. v. Cross, 17 S.W.3d 637, 646 (Tenn. Ct. App. 1999).

[106] *Omniplex World Servs. Corp.*, 618 S.E.2d at 342.

[107] O'Neill, *supra* note 15, at 118.

legitimate business prong, there is less room for error and greater guidance from precedent. When fact finders look subjectively about the power differential between employees and employers, there is more room for error—specifically if a jury may be more sympathetic to the employee.

C. Lack of Consideration as an Approach to Limit Non-Compete Agreements

To address some of the equity problems raised in a non-compete setting, some courts look to see if there is adequate consideration for the agreement. Typically, the offer for employment is considered adequate consideration to make a non-compete agreement enforceable.[108] While lack of consideration has been used as a vehicle to avoid the enforcement of non-compete agreements in the past,[109] courts are trending away from this. For example, at least one state has said that "continued employment" in exchange for signing a non-compete agreement is adequate consideration in the non-compete context.[110] If there must be some additional consideration, beyond continued employment, then the employee would have had some net benefit that resulted due to signing the non-compete agreement. Now, because "continued employment" may be enough consideration to satisfy the enforcement of a non-compete agreement, the power differential between employer and employee can no longer be adequately addressed through a consideration analysis. Therefore, a different approach is needed. Even in those states where continued employment is not enough consideration, the power differential between employer and employee prior to entering into a non-compete agreement is still at issue.[111] Because non-compete agreements are typically used as a condition of employment, if an employee refuses to sign a non-compete agreement, it is likely that she will not receive the job from the employer.

III. NON-COMPETE AGREEMENTS SHOULD BE UNENFORCEABLE WHEN THE EMPLOYER DOES NOT OFFER A WRITTEN EMPLOYMENT CONTRACT AS THERE IS NO LEGITIMATE BUSINESS INTEREST

While non-compete agreements are based primarily in state law, courts across the United States should adopt an approach that non-compete agreements are not enforceable unless the employer offers a written employment agreement for termination only for cause as there is no legitimate business interest. Adopting such an approach would address the problem of equity while also providing an answer that could easily fit into existing frameworks found in state precedent. This approach would standardize outcomes in non-compete agreement cases, give employees much needed job security, have little to no effect on upper level executives—who probably

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[108] *See* Rem Metals Corp. v. Logan, 565 P.2d 1080, 1082–83 (Or. 1977).

[109] O'Neill, *supra* note 15, at 86.

[110] Lake Land Emp't Grp. v. Columber, 804 N.E.2d 27, 31 (Ohio 2004).

[111] Davies & Davies Agency, Inc. v. Davies, 298 N.W.2d 127, 130 (Minn. 1980) ("Those cases which have held that continued employment is not a sufficient consideration stress the fact that an employee frequently has no bargaining power once he is employed and can easily be coerced.").

already have written employment contracts—and would still protect employers' legitimate business interests.

If courts use the legitimate business prong to evaluate the necessity of a non-compete agreement, and include whether there is a written employment agreement that an employee may only be fired for just cause, the analysis could turn on a clear, objective factor that is already incorporated into most states' analyses of whether a non-compete agreement is enforceable. This will lead to standardized outcomes across the United States, instead of the varying standards used currently. As mentioned previously, a variety of jurisdictions use differing approaches to address concerns with equity. These approaches range from using preliminary injunction requirements to address equity,[112] to considering the hardship that will be placed on an employee if a non-compete agreement is enforced.[113] While these approaches try to address the power differential between employers and employees, the differing analyses can lead to different outcomes. These different outcomes result in workers bound by non-compete agreements in some states facing harsher labor restrictions than workers bound by non-compete agreements in other states. If a standard analysis was used, there would not only be more uniformity in the court system, but also more uniformity in the protection of workers in the labor force.

If the standard approach—to not enforce a non-compete agreement in scenarios where there is no written employment agreement providing an employee can only be fired for cause—is used, employees will have much needed job security and flexibility. New York adopts a similar approach where the court will not enforce a non-compete agreement if an employee was fired without cause,[114] because an employer should not be able to use a non-compete agreement to "economically cripple a former employee and simultaneously deny other potential employers his services."[115] This not only protects the job security of workers, but also allows them economic freedom if their employer fires them without cause. But, the vast majority of states do not have a similar built-in protection and are instead guided by the principal of at-will employment that is dominant in the United States.[116] At-will employment primarily favors employers by allowing them to terminate the employee suddenly without cause.[117] While this will still be the standard in the vast majority of employment relationships, if an employer wants to bind an employee by a non-compete agreement, they will have to instead provide just cause termination. This will give the one in five employees in the labor force bound by non-compete agreements[118] job security that they would not otherwise have. Because it will only apply to employees that employers want to bind with non-compete agreements, it will allow employers to make intentional decisions on whether an employee is highly-skilled enough or valuable enough that a non-compete agreement is necessary to protect their businesses. This change will also give employees more flexibility

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[112] Lantech.com v. Yarbrough, 247 F. App'x 769, 772 (6th Cir. 2007).
[113] Morgan's Home Equip. Corp. v. Martucci, 136 A.2d 838, 846 (Pa. 1957).
[114] Buchanan Capital Mkts., L.L.C. v. DeLucca, 41 N.Y.S.3d 229, 230 (N.Y. App. Div. 2016).
[115] Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 397 N.E.2d 358, 361 (N.Y. 1979).
[116] *See* Stone, *supra* note 33, at 84.
[117] *Id.*
[118] Starr et al., *supra* note 2.

regarding what industries they can work in following termination by their previous employer. While non-compete agreements must be reasonable in scope to be enforceable,[119] meaning a non-compete agreement will not be enforceable if it prevents the employee from working entirely, they can prevent employees from working in specific areas of the workforce—jobs they are likely the most qualified for. Instead, this new approach would allow employees to compete for the jobs that they are already skilled in and probably provide greater pay than would otherwise be available in an industry where they have not previously worked. Both the greater job security and greater flexibility will be beneficial for employees in the labor force.

This new approach would also still protect employers' other legitimate business interests. In the past, employers used non-compete agreements almost exclusively to protect themselves from the departure of highly skilled workers.[120] Now, employers are using non-compete agreements with employees without bachelor's degrees and any specific skill set.[121] Non-compete agreements can still be used by employers to protect against the departure of highly skilled workers, in conjunction with a written employment agreement, which is probably already in place for most of these highly skilled workers. Employers will have to address non-skilled workers differently and be more cognizant about whether a non-compete agreement is necessary to protect their legitimate business interests. More broadly, the purpose of using a non-compete agreement, from an employer's perspective, is to preserve the value of its assets, protect client lists and confidential information or help gain trade secret protection, and protect investment in employee training.[122] Employers can still do a number of these things even if the new approach is adopted. While employers want to preserve relationships with valuable employees, this reasoning is susceptible to criticism if that employer terminates an employee without cause. If an employee is a valuable, contributing member of a workforce, but is terminated without cause, the employer should no longer be allowed to control the employee's employment decisions as the relationship was voluntarily terminated by the employer. Client lists and trade secret information can still be protected by using other forms of trade restrictions. For example, trade secrets are already protected by statute if certain requirements are met,[123] but many employers still contract with their employees not to disclose trade secrets.[124] This contractual agreement is separate entirely from a non-compete agreement and would still be enforceable through preliminary injunction or otherwise under the new approach. A provision regarding trade secrets and a provision addressing the taking of clients could be incorporated into the written agreement that allows a non-compete agreement to be enforceable only if the employee is fired for cause. Lastly, employers can still invest in employee training without the use of non-compete agreements. At least one court already provides that training is not a legitimate business interest enforceable by a non-compete agreement if the training only provides general knowledge or skills necessary to perform a

[119] Reeves v. Sargeant, 21 S.E.2d 184, 188 (S.C. 1942).
[120] Starr et al., *supra* note 2, at 2–3.
[121] *Id.* at 17–18.
[122] *See id.* at 7–8.
[123] 18 U.S.C.A. § 1832 (West 2016).
[124] *Id.* at 2.

job.[125] Therefore, training is only covered by non-compete agreements if the employer is training the employee in a specific process that is meaningfully different from other employers' processes.[126] If an employer's training falls in this category, it can still decide if a non-compete agreement is necessary and will only have to provide a written employment agreement for that non-compete agreement to be enforceable.

Additionally, this will not impact high-level executives that are already bound by non-compete agreements. These executives already have extensive written employment contracts outlining salary, benefits, stock ownership, and for cause termination, among other things. Under the new approach—where written employment contracts outlining for cause termination are necessary for non-compete agreements to be enforceable—non-compete agreements will be readily enforceable against high-level executives, just as they are now.

CONCLUSION

In the past, courts have used a variety of approaches to address the lack of equity and differentials in bargaining power in the non-compete agreement setting. While the approaches have different triggering factors, such as whether the employee was terminated without cause,[127] whether the reason for the firing was justified,[128] or whether there was a power differential between parties,[129] each approach is based in a theory of equity. Although employers justify the use of non-compete agreements to protect confidential information about their workplaces, or as a retention strategy to retain the highest-value employees,[130] these justifications seem like pretext when an employer can still fire the employee without cause and with no hardship. In the United States, at-will employment reigns supreme, leaving many workers with no choice but to accept the terms of at-will employment and any non-compete agreements involved, as a condition precedent of employment. The combination of the dominance of at-will employment in the United States' labor force and the willingness of the courts to enforce non-compete agreements as long as they meet some basic restrictions severely harms the average American worker. Courts are understandably wary about adopting an approach that would require specifically analyzing the bargaining power differential between employees and an employer,[131] and courts are trending away from using consideration as an inquiry into the fairness of the enforcement of the non-compete agreement.[132] Because non-compete agreements are a creature of state law, it is necessary to adopt an approach that can easily fit into the existing framework found in state law precedent.

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[125] Rem Metals Corp. v. Logan, 565 P.2d 1080, 1083 (Or. 1977).
[126] *Id.*
[127] Buchanan Capital Mkts., L.L.C. v. DeLucca, 41 N.Y.S.3d 229, 230 (N.Y. App. Div. 2016).
[128] Lantech.com v. Yarbrough, 247 F. App'x 769, 772 (6th Cir. 2007).
[129] Gann v. Morris, 596 P.2d 43, 44 (Ariz. Ct. App. 1979).
[130] *Non-Compete Agreements*, *supra* note 5.
[131] ASPELUND & BECKNER, *supra* note 78, at § 6:19 (citations omitted).
[132] *See, e.g.*, Lake Land Emp't Grp. v. Columber, 804 N.E.2d 27, 33 (Ohio 2004).

The approach that would not allow enforcement of non-compete agreements without the employer offering a written employment contract, where the employee may only be fired for just cause, fits into the existing framework of state precedent and integrates a number of public policy, power differential, and equity concerns into a simple objective factor. This approach could easily be applied by courts, would provide both employees and employers with protection from undue burdens, and would standardize the outcomes in non-compete enforcement cases across the nation.